NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 09 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JUAN VILLA-LARA, Defendant - Appellant.	No. 05-10262 D.C. No. CR-04-00111-HDM/RA MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted February 17, 2006
San Francisco, California

Before: HUG, ALARCON, and McKEOWN, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Defendant Juan Villa-Lara ("Villa-Lara") appeals his sixty-four month sentence for unlawful re-entry after deportation in violation of 8 U.S.C. § 1326(a). Villa-Lara's sentence was based on Sentencing Guidelines calculations, including a sixteen-level enhancement under U.S.S.G. 2L1.2(b)(1)(A)(i) for a prior Nevada "drug trafficking offense" felony conviction where the imposed sentence exceeded 13 months.

Villa-Lara argues that his conviction under Nevada Revised Statute ("NRS") 453.3385 does not qualify as a drug trafficking offense under *Taylor v. United States*, 495 U.S. 575 (1990). We agree, and we vacate Villa-Lara's sentence and remand for resentencing. We do not reach Villa-Lara's other arguments.

We review *de novo* a district court's decision that a prior conviction is a qualifying offense for a sentencing enhancement pursuant to U.S.S.G. § 2L1.2. *United States v. Navidad-Marcos*, 367 F.3d 903, 907 (9th Cir. 2004).

Under the *Taylor* "categorical" approach, we first look only to the fact of conviction and the Nevada statute's definition of the offense to determine whether Villa-Lara's prior conviction qualifies for the Sentencing Guidelines enhancement. *See United States v. Hernandez-Valdovinos*, 352 F.3d 1243, 1246 (9th Cir. 2003). If the Nevada statute criminalizes conduct that would not constitute a qualifying

offense under the Sentencing Guidelines, we then undertake a "modified categorical" approach and consider whether certain other documentation shows that the offense Villa-Lara committed was within the Guidelines definition. *See id.* at 1246-47.

Villa-Lara's conviction under NRS 453.3385 does not qualify as a drug trafficking offense under the categorical approach. The statute criminalizes a broader range of conduct than a drug trafficking offense as defined in the Sentencing Guidelines. The Sentencing Guidelines' definition includes an offense under state law "that prohibits . . . the possession of a controlled substance (or a counterfeit substance) *with intent* to manufacture, import, export, distribute, or dispense." U.S.S.G. § 2L1.2 cmt. n.1 (B)(iv) (emphasis added). The Nevada statute, however, criminalizes mere possession of certain amounts of controlled substances without proof of any trafficking intent.[1] NRS 453.3385 defines the instant offense to include the possession of a schedule I controlled substance other than marijuana, when the quantity is 4 grams or more, but less than 14 grams.

[1]Our holding is in accord with the Supreme Court's recent holding that a prior conviction for simple possession of a controlled substance is not a "controlled substance offense" under U.S.S.G. § 4B1.1(a). *See Salinas v. United States*, 547 U.S. __ (2006) (per curiam). "Controlled substance offense" is defined in pertinent part under U.S.S.G. § 4B1.2(b) with language identical to the definition of "drug trafficking offense" that is at issue in the instant appeal.

NRS 453.3385(1). This offense is in sharp contrast to controlled substance possession "for the purpose of sale" in NRS 453.337(1), which we held qualifies as a drug trafficking offense under the Sentencing Guidelines. *See United States v. Benitez-Perez*, 367 F.3d 1200, 1204 (9th Cir. 2004). Although the title of NRS 453.3385 uses the phrase "[t]rafficking in controlled substances," a statutory title cannot undo or limit the plain meaning of the statute's actual text, when there are no ambiguous words or phrases therein. *See Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947).

Turning to the modified categorical approach, no documents indicate that Villa-Lara actually committed a drug trafficking offense under the Sentencing Guidelines' definition. The Information states that Villa-Lara was charged with possession of a "trafficking quantity" of a controlled substance. This does not reveal that he had any trafficking intent. Moreover, the Information identifies the controlled substance as a cocaine mixture, which is a schedule II substance that would not even qualify Villa-Lara for conviction under NRS 453.3385.

We VACATE Villa-Lara's sentence and REMAND for resentencing.